

A

Teng Boon How v Pendakwa Raya

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-176-90

HARUN HASHIM, MOHAMED AZMI AND EDGAR JOSEPH JR SCJJ

B 20 SEPTEMBER 1993

Criminal Procedure — Trial — Examination of witnesses — Interference by judge — Trial judge assumed role of prosecutor by cross-examining accused and his witnesses — Whether ground for appeal

C *Criminal Procedure* — Trial — Interruptions by judge — Limits of judicial intervention — Evidence Act 1950 s 165

Criminal Procedure — Trial — Accused — Right to remain silent — Failure of trial judge to recognize right — Whether judge drew inference of guilt from accused's silence — Duty of care and fairness to accused

D

The appellant had been tried and convicted of trafficking in heroin under s 39B(1)(a) of the Dangerous Drugs Act 1952. At the trial, the judge subjected the accused and his witnesses to severe cross-examination, after they had been examined and cross-examined by the deputy public prosecutor and defence counsel. In particular, the cross-examination by the judge was aimed at criticizing the accused on his failure to disclose to the police, by way of a cautioned statement, the name of the taxi driver who was a vital witness for the defence.

E

The principal grounds of appeal argued were twofold, namely, that: (i) the judge had assumed the role of a prosecutor by cross-examining the accused and the defence witnesses not just for the purpose of clarifying testimony given, but to include matters not arising from the evidence adduced, and the conviction was based mainly upon the results of such cross-examination; and (ii) the judge had misdirected himself inasmuch as his comments on the defence suggested that a vital witness for the defence should be disbelieved because his name had not been disclosed by the accused in a cautioned statement to the police and that it was not until the trial that there was such disclosure. The appellant was also criticized for not having made prior disclosure to the police of the name of his friend whom he had intended to visit on the night in question.

F

G

H

Held, allowing the appeal:

(1) Judicial loquacity has provided grounds for appeal and excessive interventions by the trial judge add great weight to the substance of the appeal, and may result in the reversal of judgment in a civil case or the setting aside of a conviction in a criminal case. In certain circumstances, the criticism of the conduct of the trial judge is of such magnitude as to constitute a sufficient ground for reversal of the judgment or quashing of the conviction. In other cases, the appellate court may reduce the sentence. Justice is best

I

- done by a judge who holds the balance between the contending parties without himself taking part in their disputations. A
- (2) The learned judge had fallen into error, first, in descending into the arena of dispute and secondly, in allowing his judgment of the facts to be clouded by the results of his cross-examination. Taken together these errors were sufficient to lead to the quashing of the conviction. B
- (3) Notwithstanding the wide ambit of s 165 of the Evidence Act 1950, the desirable limits of judicial intervention in the examination and cross-examination of witnesses as set out under the common law of England apply in this country. These limits apply with double force in the case of interrogation by a judge of an accused person, since the nature of examination contemplated by s 165 of the Evidence Act 1950 is not examination or cross-examination of an inquisitorial nature for the purpose of entrapping an accused or of extracting from him damaging admissions upon which to build up a case against him or to supply a gap in the evidence for the prosecution, especially in the case of a capital charge. The failure of a trial judge sitting alone, to direct himself correctly in accordance with these principles must be treated in the same way as a failure to direct a jury correctly. C D
- (4) The judge failed to recognize that: (i) the appellant had a right to silence when interrogated by the police, whether before or after being cautioned, except where the defence of the accused was an alibi; and (ii) although a judge could properly comment that an explanation had been given for the first time at the trial, that had to be done with care and fairness to the accused in all the circumstances of the case. E
- (5) Where the judge took into consideration the belatedness of an explanation offered by an accused for the first time at the trial as diminishing the weight of that explanation, he should make it clear that he recognized the right of the accused to remain silent and that he was not drawing an inference of guilt from such silence. No particular form of words was necessary provided his mind on the matter was clearly revealed in his judgment. In the present case, the judgment of the judge clearly suffered from these defects and there was a misdirection on that score. F G
- (6) In all the circumstances, the court was convinced that a miscarriage of justice might well have occurred and accordingly the conviction was quashed and the appellant acquitted and discharged. H

[Bahasa Malaysia summary

Perayu telah dibicara dan disabit kerana mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Pada perbicaraannya, hakim telah memeriksa balas tertuduh dan saksinya dengan keras, selepas mereka telah diperiksa dan diperiksa balas oleh timbalan pendakwa raya dan peguambela. Terutamanya, pemeriksaan balas oleh hakim ditujukan kepada mengkritik tertuduh kerana gagal mendedahkan kepada I

A pihak polis, melalui pernyataan beramaran, nama pemandu teksi yang menjadi saksi yang sangat penting untuk pihak pembela.

B Alasan yang diujjahkan di dalam rayuannya bercabang dua, iaitu bahawa: (i) hakim telah mengambil peranan pendakwa dengan memeriksa balas tertuduh dan saksi pihak pembela, bukan hanya untuk menjelaskan keterangan yang telah diberi, tetapi termasuk perkara yang tidak timbul dari keterangan yang dikemukakan, dan sabitan tertuduh berasaskan terutamanya kepada hasil pemeriksaan balas itu; dan (ii) hakim telah menyalah arah dirinya setakat mana komennya tentang pembelaan membayangkan bahawa saksi yang sangat penting bagi pihak pembela seharusnya tidak dipercayai oleh kerana namanya tidak didedahkan oleh tertuduh di dalam pernyataan beramarannya kepada polis dan pendedahan itu hanya dibuat pada masa perbicaraan. Perayu juga telah dikritik kerana tidak mendedahkan pada awal lagi kepada pihak polis nama kawan yang diziarahinya pada malam berkenaan.

D **Diputuskan**, membenarkan rayuan itu:

E (1) Kebecokan kehakiman menyediakan alasan untuk rayuan dan campur tangan yang keterlaluan oleh hakim perbicaraan memberatkan lagi isi rayuan itu, dan mungkin mengakibatkan pengakasan penghakiman dalam sesuatu kes sivil atau pengetepian sabitan dalam suatu kes jenayah. Di bawah keadaan tertentu, kritikan kelakuan hakim perbicaraan begitu besar magnitudnya sehingga ia merupakan alasan yang mencukupi untuk pengakasan penghakiman atau pembatalan sabitan itu. Dalam kes lain, mahkamah rayuan mungkin mengurangkan hukuman. Seseorang hakim boleh berlaku adil dalam cara yang terbaik dengan mengekalkan imbalan di antara pihak yang bersaing tanpa mengambil bahagian dalam pertikaian mereka.

F (2) Hakim yang arif telah tersilap, pertama, dengan menurun ke dalam gelanggang pertikaian dan, keduanya, dengan membenarkan penghakimannya mengenai fakta dikaburkan oleh hasil pemeriksaan balasnya. Diambil bersama, kesilapan itu mencukupi untuk membawa kepada pembatalan sabitan itu.

G (3) Meskipun lingkungan s 165 Akta Keterangan 1950 adalah luas, batasan yang berpatutan berkenaan dengan campur tangan penghakiman di dalam pemeriksaan dan pemeriksaan balas saksi seperti yang dinyatakan di bawah common law di England terpakai di negara ini. Batasan itu terpakai dua kali ganda dalam kes soal-siasat tertuduh oleh hakim, oleh kerana sifat pemeriksaan yang dimaksudkan oleh s 165 Akta Keterangan 1950 bukanlah pemeriksaan atau pemeriksaan balas bersifat penyiasatan yang bertujuan untuk memerangkap tertuduh atau untuk mendapat pengakuan merosak daripada tertuduh bagi menguatkan kes terhadapnya atau untuk menutupkan celah di dalam keterangan pihak pendakwa, lebih-lebih lagi dalam kes tuduhan yang membawa hukuman mati. Kegagalan hakim perbicaraan yang

I

- bersidang seorang diri untuk mengarahkan dirinya dengan betul mengikut prinsip ini mesti disamakan dengan kegagalan untuk mengarahkan juri dengan betul. A
- (4) Hakim gagal menyedari bahawa: (i) perayu mempunyai hak untuk mendiamkan diri apabila disoal-siat oleh pihak polis, sama ada sebelum atau selepas diberi amaran, kecuali di mana pembelaan tertuduh ialah alibi; dan (ii) walaupun seseorang hakim boleh membuat komen bahawa sesuatu penjelasan telah diberikan untuk kali yang pertama pada perbicaraan, ia mesti dilakukan dengan cermat dan adil kepada tertuduh, memandangkan keseluruhan keadaan kes itu. B
- (5) Apabila hakim mengambil kira kelengahan penjelasan yang hanya diberi oleh tertuduh untuk kali pertama pada masa perbicaraannya sebagai mengurangkan kepercayaan yang boleh diberikan kepada penjelasan itu, beliau patut menjelaskan bahawa beliau menyedari hak tertuduh untuk mendiamkan diri dan beliau tidak membuat inference bersalah dari pendiaman dirinya itu. Tidak ada sebarang bentuk perkataan khas yang diperlukan, asalkan pendapat hakim atas perkara itu jelas didedahkan di dalam penghakimannya. Di dalam kes ini, penghakiman hakim jelas mempunyai kecacatan itu dan terdapat salah arah di dalam perkara ini. D
- (6) Memandangkan keseluruhan keadaan, mahkamah yakin bahawa kemungkinannya besar suatu salah laksana keadilan telah berlaku dan dengan itu sabitan hendaklah dibatalkan dan perayu dibebaskan. E

Notes

For a case on interruptions by the trial judge, see 5 *Mallal's Digest* (4th Ed) para 2644. F

For a case on misdirection by the magistrate, see 5 *Mallal's Digest* (4th Ed) para 236.

Cases referred to

- 1 *Brassington v Brassington* [1962] P 276; [1961] 3 All ER 988; [1961] 3 WLR 1411 (refd) G
- 2 *Yuill v Yuill* [1945] P 15 (folld)
- 3 *Jones v National Coal Board* [1957] 2 QB 55; [1957] 2 All ER 155; [1957] 2 WLR 760 (folld)
- 4 *R v Gilson and Cohen* (1944) 29 Cr App R 174 (distsd) H
- 5 *R v Clewer* (1953) 37 Cr App R 37 (distsd)
- 6 *Hobbs v Tinling* [1929] 2 KB 1 (refd)
- 7 *R v Green* [1949] WN 488; [1950] 1 All ER 38; (1950) 34 Cr App R 33 (refd)
- 8 *R v Mc Kenna* [1960] 1 QB 411; [1960] 1 All ER 326; [1960] 2 WLR 3061 (refd) I
- 9 *R v Hircock* [1970] 1 QB 67; [1969] 1 All ER 47; [1969] 2 WLR 29 (refd)

- A 10 *R v Matthews & Matthews* (1984) 78 Cr App R 23; [1983] Crim LR 683 (refd)
- 11 *R v Cain* (1936) Cr App R 204 (distsd)
- 12 *R v Bateman* (1946) 31 Cr App R 106 (distsd)
- 13 *Gan Kok Liong v PP* [1969] 1 MLJ 30 (distsd)
- B 14 *Roseli bin Amat & Ors v PP* [1989] 2 MLJ 65 (distsd)
- 15 *R v Hall* [1971] 1 WLR 298 (refd)
- 16 *R v Chhui Yi* [1936] MLJ 142 (refd)
- 17 *Fazal Din v PP* [1949] MLJ 123 (refd)
- 18 *R v Ryan* [1973] 2 NZLR 611 (refd)
- 19 *R v Gilbert* (1977) 66 Cr App R 237; [1978] Crim LR 216 (refd)

C

Legislation referred to

Evidence Act 1950 s 165

Appeal from: Criminal Trial No 58-3-87 (High Court, Johor Bahru)

D

WP Leong (*WP Leong & Partners*) for the appellant.*Ng Aik Guan* (Deputy Public Prosecutor) for the respondent.

Edgar Joseph Jr SCJ (delivering the grounds of judgment of the court): This was an appeal against conviction and sentence of death for trafficking in a dangerous drug, to wit, 26.3gm of heroin, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952.

E

The case for the prosecution in outline was that, on 20 January 1986, at about 8pm, a police party consisting of Insp Jasbir Singh (PW3) and three of his men, proceeded to a housing complex known as Taman Sentosa, Johor Bahru and, on arrival there, took up ambush positions.

F

It was said that at about 8.20pm, a motor car arrived and pulled up at a point close to where members of the police party were lying in wait, unbeknown to the driver of the car who was identified as the appellant.

It was further said that the appellant then alighted from the car, walked along Jalan Sutera 3, passing Insp Jasbir Singh and one of his men, Zainuddin Khalid ('Zainuddin') (PW5), and then proceeded to a lane which bore no name, described by the trial judge, as 'lorong yang tidak ada nama'. He was quickly followed by Insp Jasbir Singh and Zainuddin. On arrival at the junction of 'lorong yang tidak ada nama' and another road called Jalan Sutera 5, it was alleged that the appellant first looked back and then took to his heels, running along Jalan Sutera 5, pursued by Insp Jasbir Singh and Zainuddin. After a short chase, Insp Jasbir Singh managed to catch up with the appellant and, with the help of Zainuddin, managed to overpower him.

G

A search of the person of the appellant followed and it was alleged that there was recovered from beneath the waist of his trousers, a newspaper wrapping which contained a plastic packet in which was a substance suspected to be heroin, and later confirmed by the government chemist to be so, in weight 26.3gm. Also recovered from the person of the appellant was a car key and a purse containing RM694. A search of the appellant's home, later, on the same night, disclosed nothing incriminating.

I

Upon that evidence, the trial judge ruled that there was a case for the appellant to answer. A

The appellant elected to give sworn evidence. His version was that on the night in question, he was at home when his brother, Tan Booy Keng (DW2), arrived driving his (the appellant's) car, JBL 993 — a car which he (the appellant) had purchased on hire-purchase terms, even though he had no driving licence. The brother then invited the appellant to go shopping with him to the Sentosa Shopping Complex. The appellant agreed; so they both proceeded to the Sentosa Shopping Complex in the car, with the brother at the wheel and, on arrival there, pulled up and parked the car at the place described by Insp Jasbir Singh. B

However, on alighting, the appellant had second thoughts and told his brother that he would be visiting a friend, indicating a place nearby, and that he would catch up with the brother later in the Sentosa Shopping Complex. C

The appellant claimed that he then walked along the route indicated by Insp Jasbir Singh in court and that, as he passed by a few houses along Jalan Sutera 5, he noticed a man running towards him and who had emerged from a house to his right. This man, said the appellant, had bent down slightly and then threw a packet under a car that was parked nearby. He then continued to run towards the appellant and, knocking into the appellant, causing the appellant to spin and to fall to the ground, as a result of which the appellant suffered injuries and tears to his trousers. Just then, Insp Jasbir Singh appeared on the scene and arrested the appellant. The appellant then alleged that Insp Jasbir Singh picked up the packet from underneath the parked car, not the appellant's car, but the other car — opened the packet and showed its contents to the appellant. D E

The brother corroborated the appellant's version regarding his visit to the appellant's house on the night in question, and their leaving together in the appellant's car to go to the Sentosa Shopping Complex, as the brother wished to buy some household items, like toothpaste, toilet paper and how they parted company outside the shopping complex when the appellant suddenly recalled that he had to see a friend. F

But, there was another witness — an important one — a taxi driver named Loh Chin Wah (DW3), who claimed that he was on the scene at the material time, sitting in the driver's seat of his stationary taxi, with head lights on, having just dropped a passenger, some 10–20ft away from the appellant, who was in front of him. G

He then went on to corroborate the appellant's version about seeing a man emerge from a house to the appellant's right, running, and being pursued by a group of people, and this man knocking into the appellant. The rest of his evidence, in the words of the judge, 'corroborates to almost exactly what was stated by the accused — (the appellant)'. The judge noted that this witness had even testified that he saw Insp Jasbir Singh pick up the packet containing the heroin from underneath a parked car, show it to the appellant, and then take the appellant away in another car parked nearby. H I

In the course of the trial, the judge himself subjected the appellant (upon recall by the court), his brother, Tan Booy Keng, and the taxi driver, Loh

- A Chin Wah, to somewhat severe cross-examination, though he did not cross-examine any of the prosecution witnesses.

The cross-examination of the appellant by the court took place after he had been examined, cross-examined by the deputy public prosecutor, and re-examined by defence counsel; more particularly, it was upon recall by the court, on the day after his re-examination was concluded, and was as follows:

- B On 20 January 1986 I wished to look for a friend — an ordinary friend. His name is Ah Hwa. I know his address is 46, Jalan Sutera 5.

He rents a room. Before the incident, I did not go to his place. Before the incident, I knew him. Once or twice, I had met him there.

- C I did not make an appointment to meet him on that day. It was after work and he was in the house.

Ah Hwa is a wireman.

I told my brother my friend's name nine months after I was arrested because I did not know that the matter would become important. When my brother met me nine months after the incident, I told him Ah Hwa's name.

- D I did not disclose Ah Hwa's name to the police because the police did not ask me. ASP M Ali did not ask me any questions.

Another officer asked me questions. When he asked, I did not want to answer because I wanted to answer in court. After I was arrested, I was brought by the police several times from one place to another. As a result, I did not want to disclose this matter to the police. I had been arrested by the police.

- E I had given information regarding the taxi to the police. Within one week after my arrest, I gave that information to one police officer. I can't recognize that officer. He did not ask me other questions regarding this matter.

I was questioned by one police officer. I did not want to answer because I wanted to give a statement in court and not in his office. I told him I wanted to give one statement in court. I did not give the information to the police at that time, because friends in the lock-up and prison told me not to give evidence to the police.

- F A few months after the incident, my family engaged a lawyer. I gave that information to the lawyer. I do not know whether the lawyer had written a letter to the public prosecutor regarding this information.

If my brother did not see me on the day of the incident, I would still have gone and looked for Ah Hwa.

- G The cross-examination of the appellant's brother, Tan Booy Keng, by the court, occurred after he had been examined-in-chief, cross-examined and re-examined, and was as follows:

- H The items that I bought from Sentosa complex are tissue paper, a toothbrush, toothpaste, soap and things that we use in the house.

The provision shop where I worked is not mine. The name of the provision shop owner is Yeo Hai Jee.

The provision shop does not sell toothpaste, toothbrushes, tissue paper and soap.

The provision shop does not sell all those items.

- I When I went to see the accused in the police lock-up, I went with the accused's wife. There was no other person.

At the police station, I spoke to the accused in an office. Also present were a police officer and another officer who brought the accused.

I do not know for how long we were talking. At that time, he did not tell me about his friend's name. A

The second time I met him was about seven to eight months after the accused was in the prison. I did not see him after the first meeting because the prison authority did not allow me to do so.

Within seven to eight months I could have met him but I had no time to go. His wife met me. His wife did not tell me Ah Hwa's name. The accused told me the name. B

On 20 January 1986, on my way to Taman Sentosa, I stopped by the accused's place and asked if he wished to follow me. I asked the accused to follow me to buy things. When I met the accused, he did not tell me that he wished to see his friend. In the car, from the accused's residence to Taman Sentosa, the accused did not say that he wished to look for his friend. C

I was not surprised when he said he wished to see his friend when he parked his car.

The accused gave me two to three keys. One of them could start the engine. The rest were for locking the petrol tank.

When the car was purchased by the accused, it was brought to my house. After that, I used the car. D

I did not ask whether he had checked on the driving licence.

I did not see the accused drive the car anywhere.

When the representative from the company sold the car, he sent the car to my house. At that time, I was not in the house. The accused and the representative brought the car.

The accused gave me the keys. I received the keys only. Only one key could start the car. Other keys could not. E

The cross-examination of the taxi driver, Loh Chin Wah, by the court also occurred after he was examined-in-chief, cross-examined and re-examined, and was as follows:

Witness marks 'X' with a green pen on the sketch plan showing where the man was running from the house. The house from where the man was running was about six or seven houses in front of me. F

The distance from me to where the man who was running knocked into the accused, was 10-20ft.

When the man who was running threw the packet, the distance from me was about 10-20ft. G

Witness demonstrates in court where the man who was running had bent slightly and thrown the packet of [some]thing underneath the car. The car was 10ft from me. I can't recall the colour of the car.

The car into which the accused was taken after the arrest was parked in front of me, three or four houses away from me. The back of the car was facing me. I can't recall the colour of the car. H

Jalan Sutera 5 can be seen if it is not dark. I can remember the accused's clothing. Short-sleeved shirt and long trousers. I can't recall the colour of his shirt and trousers.

Including the accused, there were about five or six persons at the place of the incident and they had surrounded the accused.

There was no lamp post at the place where the man who was running knocked into the accused. I

Before the clash, the accused was walking on my right side from the back.

At the time of the incident, I saw the accused walking only.

A I can't recall if, within three to four minutes during the incident, any car had passed me to Jalan Sutera 5.

I have been driving taxis for six to seven years. Before the incident, I had been driving taxis for one or two years. The taxi which I drove on that day belonged to my friend. I have a licence for driving taxis. On the day of the incident, I was not registered with anyone to drive the taxi.

B After the accused fell down, one Singh arrived. That Singh caught hold of the accused.

The man who was running from the house was wearing a short-sleeved shirt and long trousers. Its colour I cannot recall. The man who was running was about 5ft or more tall.

C The distance between the man who was running away and the Singh who was chasing him along Jalan Sutera 5 was 20–30ft. I did not see the Singh chasing after the man who was running after he knocked into the accused.

Singh caught the accused before picking up the packet from underneath the car.

The place where the accused fell and where the Singh picked up the packet was just nearby.

D No police officer interviewed me after the incident day.

Before I become a taxi driver, I was a construction worker. I worked as a cement mixer in Kota Tinggi.

I was born in Kota Tinggi. I have not married.

I do not know the accused nor his family.

Nobody from the accused or his family or his friend gave me money for giving evidence.

E On that day, I worked from 5pm till midnight.

Before us, the principal grounds of appeal argued were twofold; namely, firstly, that, the judge had assumed the role of a prosecutor by cross-examining the appellant and the defence witnesses, and that this cross-examination was not for the purpose of just clarifying testimony given but went much further, including within its range, matters not arising from the evidence adduced, and that the conviction was based mainly upon the results of such cross-examination.

Secondly, it was argued that in considering the defence of the appellant, the judge had misdirected himself inasmuch as his comments on the defence suggested that the vital witness for the defence, being the taxi driver, Loh, should be disbelieved because his name had not been disclosed by the appellant in a cautioned statement to the police and that it was not until the trial that there was such disclosure. Similarly, the appellant was criticized for not having made prior disclosure to the police of the name of his friend, Ah Hwa. In this context, it was pointed out that the cross-examination of the appellant by the judge, to which exception was taken, included such matters.

As there was a certain amount of overlapping between the two principal grounds of appeal to which we have referred, we consider it would be more convenient if we were to deal with them together.

I Judicial loquacity has provided grounds for appeal and we need no more than refer to some of the well-known cases in this area.

Excessive interventions by the trial judge add 'great weight to the substance of the appeal' (*Brassington v Brassington*¹ at p 281) and taken together with

other grounds of appeal may result in the reversal of judgment in a civil case (*Yuill v Yuill*;² *Jones v National Coal Board*³) or setting aside of a conviction in a criminal case. (See *R v Gilson and Cohen*;⁴ *R v Clewer*.⁵) In certain circumstances, the criticism of the conduct of the trial judge is of such magnitude as to constitute, by itself, a sufficient ground for reversal of the judgment (see *Hobbs v Tinsling*;⁶ *Jones v National Coal Board*³) or quashing of the conviction. (See *R v Green*,⁷ *R v Mc Kenna*.⁸) In other cases, even though the interventions of the judge may not result in the quashing of the conviction, the appellate court may reduce the sentence, thus giving effect to its disapproval (see, eg *R v Hircock*⁹).

It was Lord Greene MR who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations. If a judge, said Lord Greene, in *Yuill v Yuill*,² should personally conduct the examination of witnesses, 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict'.

And, it was Lord Denning MR who, in *Jones v National Coal Board*,³ emphasized the importance of the judge not descending into the arena and thereby depriving himself of the ability to take a detached view when forming his conclusion. This is how he put it [at p 64]:

Yes, he [the judge] must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales — the 'nicely calculated less or more' — but the judge at the end decides which way the balance tilts, be it ever so slightly... So also it is for the advocates, each in his turn, to examine the witnesses, not for the judge to take it on himself lest by so doing he appear to favour one side or the other... And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost... The judges' part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.'

In *R v Matthews & Matthews*,¹⁰ the Court of Appeal in England said (at p 30 para 6) that the general comment in *Jones v National Coal Board*,³ emphasizing the importance of a judge not descending into the arena and thereby depriving himself of the ability to take a detached view when forming his conclusion, is equally applicable to a criminal trial.

We agree that, notwithstanding the wide ambit of s 165 of the Evidence Act 1950, which provides:

A Judge's power to put questions or order production.

The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that—

- C (i) the judgment must be based upon the facts declared by this Act to be relevant and duly proved;
- (ii) this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which the witness would be entitled to refuse to answer or produce under sections 121 to 131 if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with the primary evidence of any document, except in the cases hereinbefore excepted.

the desirable limits of judicial intervention in the examination and cross-examination of witnesses enunciated in *Yuill v Yuill*² and *Jones v National Coal Board*³ would apply in this country. These limits apply with double force in the case of interrogation by a judge of an accused person since, in our view, the nature of examination contemplated by s 165 of the Evidence Act 1950 is not examination or cross-examination of an inquisitorial nature for the purpose of entrapping an accused, or of extracting from him damaging admissions, upon which to build up a case against him or to supply a gap in the evidence for the prosecution. Especially is this so, in the case of an accused facing a capital charge. We must, therefore, treat the failure of a trial judge sitting alone, to direct himself correctly in accordance with these principles, in the same way as a failure to direct a jury correctly.

We have also considered cases such as *R v Gilson and Cohen*,⁴ *R v Cain*¹¹ and *R v Bateman*¹² cited with approval in *Gan Kok Liong v PP*,¹³ and *R v Clewer*,⁵ but these cases can, to some extent, be distinguished from the present case, because, unlike the present case, the interventions by the judge, by way of cross-examination were during the examination-in-chief or cross-examination of the accused person or his witnesses.

Similarly, the Singapore case of *Roseli bin Amat & Ors v PP*,¹⁴ is also distinguishable because there, unlike here, there were interruptions preventing the accused persons from giving evidence in their own way and the making of adverse comments of the following sort:

- (i) excessive interruptions by the learned judge in the examination and cross-examination of witnesses by counsel, with the consequence that counsel were unduly hampered in the cross-examination of the prosecution witnesses and in the examination of their own clients;

- (ii) unfair and improper cross-examination by the learned judge of the appellants in a hostile manner, including disallowing them to give evidence in their own way; and
- (iii) making adverse comments or observations which strongly indicated that the learned judge had closed his mind and pre-determined the guilt of the appellants prior to considering all the evidence before him.

Nevertheless, we were reluctantly driven to the conclusion that the judge did, in this case, descend into the arena and did allow his judgment of the facts to be clouded by the results of his cross-examination of the appellant, the brother, Tan Booy Keng, and the taxi driver, Loh Chin Wah, though we do not doubt that he was actuated by the best of motives.

As for allowing his judgment of the facts to be clouded by the results of his cross-examination, we need no more than refer to the following extracts from his judgment, which show clearly that the judge did, in convicting the appellant, rely on the results of his cross-examination of the appellant:

What puzzled the court was why this information about the existence of a vital witness (the taxi driver) was not told to the police until this hearing.

In answer to the question by the court on this point, the accused replied that he had not been asked by the police authorities. Again, when pressed further, the accused replied that he refused to give any statement to the police because the officer sent to record his statement informed him that he could either give a statement then, or inform the court of the same during the hearing date. The accused of course chose to stay almost four and a half years in jail to tell this court about the existence of a taxi driver who alleged that he saw everything.

The court questioned the accused as to why he was visiting his friend on that particular day, and the name and address of his friend he intended to visit on that particular day.

The accused testified that the name of his friend was one Ah Hwa, who resided in one of the houses along Jalan Sutera 5. His intention of visiting Ah Hwa was to ask Ah Hwa to work for him.

Ah Hwa could not be contacted to testify because DW2 was only told of Ah Hwa some eight to nine months after the arrest of the accused. When DW2 attempted to locate Ah Hwa, Ah Hwa 'sudah pindah rumah' and could not be found.

Again, why was the existence of Ah Hwa not told to the police authorities earlier? This again, could have assisted the police authorities to check on the accused's contention and could have even secured immediate release. However, the accused's reply was that he had not been asked and he preferred to give his version of the events in court some four and a half years later.

This brings us to the second ground of appeal, which is closely connected with the first ground of appeal, in that the cross-examination by the judge of the appellant was aimed at criticizing the appellant for his failure to disclose to the police, by way of a cautioned statement, the name of the taxi driver, who was a vital witness.

The appellant was also pressed in cross-examination by the judge, for his failure to inform the police about his friend, Ah Hwa or, in other words, about his parting company with his brother outside the shopping complex because he suddenly decided to visit Ah Hwa and ask the latter to work for him.

A The appellant explained his omission to give a statement to the police by saying that the police officer who had been sent to record his statement had informed him that he could either make a statement or say what he wished to say in court. We find nothing improbable in this explanation, yet the judge looked at it askance.

B Be that as it may, the judge failed to recognize, firstly, that the appellant had a right to silence when interrogated by the police, whether before or after being cautioned. Indeed, the terms of the statutory caution under proviso (b) to s 37A(1) of the Dangerous Drugs Act 1952 merely reminds him of a right he already has at common law to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. (Per Lord Diplock in *R v Hall*.¹⁵) The exception to this rule, is where the defence of the accused is an alibi (see the statutory obligation on an accused to give notice to the prosecution of a defence of alibi under s 402A of the Criminal Procedure Code (FMS Cap 6). Even prior to the introduction of s 402A of the Criminal Procedure Code (FMS Cap 6), an alibi defence was an exception to the rule that it is improper for a judge to make any adverse comment on the failure of an accused to disclose his defence until the trial. (See, eg *R v Chhui Yi*¹⁶ and *Fazal Din v PP*.¹⁷)

E Secondly, although a judge may properly comment that an explanation has been given for the first time at the trial, this has to be done with care and fairness to the accused in all the circumstances of the case. (See *R v Ryan*.¹⁸) The Privy Council and English authorities show that the dividing line between what is fair comment and what is not, has been recognized to be a fine one. (See 11 *Halbury's Laws of England* (4th Ed) para 299; Archbold *Pleading Evidence and Practice* (1992) paras 4–407.)

F It has been said that there is a clear distinction between drawing an inference of guilt from prior silence and taking into consideration such silence as diminishing the weight of any explanation given by the accused for the first time at the trial. However, as Lord Dilhorne, speaking for the Court of Appeal in *R v Gilbert*¹⁹ rightly pointed out, there is no clear dividing line, as in each situation the jury are invited to draw an inference adverse to the accused on account of his exercise of the right to silence. It follows that, in practice, the distinction is too fine to be of any practical value even if the trial is before a judge sitting alone.

H Where the judge takes into consideration the belatedness of an explanation offered by an accused for the first time at the trial as diminishing the weight of that explanation, this will usually not be fair unless he makes it clear that he recognizes the right of the accused to remain silent and that he is not drawing an inference of guilt from such silence. No particular form of words is necessary, provided his mind on the matter is clearly revealed in his judgment. In the present case, the judgment of the judge clearly suffers from these defects and so there was clearly a misdirection on this score.

I It follows, from what we have said thus far, that the judge had fallen into error, first, in descending into the arena and, secondly, in allowing his judgment of the facts to be clouded by the results of his cross-examination, an important part of which was directed at the non-disclosure by the

appellant of his defence, including the names of the taxi driver and his friend, Ah Hwa, to the police. Taken together, these errors were sufficient to lead to the quashing of the conviction.

That, however, is not the end of the matter because, towards the end of his judgment, the judge found that at or about the time of his arrest, the appellant was about to carry out a sale of dadah (a dangerous drug) to some person near the booth and, that being early, the appellant had proceeded to the telephone booth to make a call, when he noticed that he was being watched by Insp Jasbir Singh and Zainuddin, so he proceeded along the lane known as 'lorong yang tidak ada nama', with the intention of slipping away and later returning to his car. With respect to the judge, there was not a tittle of evidence justifying these inferences.

Unfortunately, the judgment was also vulnerable on other grounds and these related to the following findings of fact by the judge, by way of criticism of the appellant's case:

- (i) 'The (proposed) visit to Ah Hwa on the night of the incident was apparently not planned. I find this *strange*' (at p 134 para 1) (emphasis supplied), when the correct approach should have been whether this might reasonably have been true.
- (ii) 'In the light of all these circumstances, Ah Hwa *seems* to be a creation after the event' (at p 134 para 2) (emphasis supplied), which fell far short of a positive finding that the story about Ah Hwa *was* a recent invention.
- (iii) 'The accused denied that he was driving on that particular day. The accused contended he has no driving licence. Nevertheless, the accused purchased a car with an initial outlay of RM8,000 and incumbered himself with approximately RM500 per month towards instalments under hire-purchase. *This car he allowed his brother to drive while the car was registered in his own name*' (at p 134 para 3) (emphasis supplied), when there was nothing improbable about these averments.
- (iv) '... I find it *strange* that DW2 (the appellant's brother) happened to drop by the accused's place and asked him to go shopping. DW2 was not even sure whether the accused was around at the material time when he dropped by' (at p 134 para 4) (emphasis supplied), when the correct approach should have been whether this might reasonably have been true.
- (v) '... why would DW2 (the appellant's brother) want to go shopping for household items such as toothpaste and toilet or tissue paper when he himself was working for a fairly large provision shop that had all these items in stock?', overlooking the fact that the explanation of DW2 that the provision shop at which he worked did not sell the items he required (at p 134 para 4), was never disproved by the prosecution.
- (vi) 'It is *strange* that the accused did not see anyone chasing the person who knocked into him' (at p 135 para 1) (emphasis supplied), when the correct approach should have been whether this might have been reasonably true.

- A (vii) 'The manner that accused fell was also rather unusual. From the tear of the trouser and the injuries sustained by the accused, it is more in line with PW5 downing him from the rear', in the absence of forensic medical evidence supporting such a finding.
- (viii) 'The time of the incident was approximately 8.30pm. The defence contended that it was not very dark, which I find hard to believe', (at p 35 para 3), although Insp Jasbir Singh had himself testified that visibility was good, it being bright ('permandangan terang').
- B

In all the circumstances, we were completely convinced that a miscarriage of justice might well have occurred. Accordingly, the conviction was quashed, the sentence of death set aside and the appellant acquitted and discharged.

C

Appeal allowed.

Reported by Prof Ahmad Ibrahim

D

E

F

G

H

I